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No. 1169

In the Supreme Court of the United States

OCTOBER TERM, 1969

ALFRED S. CALABRESE AND JOHN M. DELZOPPO,
PETITIONERS,

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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379-578—70

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 18–27) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on January 15, 1970. The petition for a writ of certiorari was filed on February 11, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial judge's participation deprived petitioners of a fair trial.

2. Whether the court erred in initially placing a restriction (thereafter withdrawn) on the manner in which defense counsel could use certain FBI memoranda to impeach witnesses.

STATEMENT

On retrial,[1] petitioners were convicted of armed robbery of a federally insured bank, in violation of 18 U.S.C. 2113(a) and (d). On December 18, 1968, each was sentenced to imprisonment for eighteen years. The court of appeals affirmed (Pet. App.).

The evidence showed that shortly after 10:30 a.m. on December 14, 1967, three armed men robbed the Euclid-Green branch of the Society National Bank, Cleveland, Ohio. Each wore gloves, stocking masks and dark glasses. One wore a plaid flannel shirt and a hat, while the other two wore hooded sweatshirts. As one robber vaulted over the teller's counter and removed three trays containing more than $27,000, a second stood by or near the counter, and a third, carrying a carbine, kept watch over the customers (Tr. 48–49, 108, 172–176). The robbers exited from the bank less than one minute after they had entered (Tr. 378). They were seen driving away in a green 1964 Ford, heading west on Euclid and turning south on Cliffview Road, a few blocks away (Tr. 58). Within

[1] Petitioners' first trial before a different district judge ended on May 16, 1968, in a mistrial because the jury was unable to reach a verdict. The second trial began on October 1, 1968.

seconds of the robbers' entrance, one of the tellers had pressed an alarm button which triggered a movie camera and alerted police.

The police arrived momentarily, and obtained descriptions of the robbers and the getaway car, which were broadcast over the police radio. The report was heard by Officer William Lloyd, who was in an unmarked car driving on Belvoir Road near Cliffview. He immediately proceeded toward Cliffview Road. En route, he observed a 1966 Oldsmobile headed in the opposite direction. As the cars passed each other, the officer saw petitioner Delzoppo, whom he knew, seated on the passenger side of the Oldsmobile. Watching the Oldsmobile in his rear-view mirror, Lloyd observed a bundle of what appeared to be clothing being thrown out of the passenger side of that car. He stopped the Oldsmobile and arrested both Delzoppo and petitioner Calabrese, who had been driving (Tr. 230–238). Lloyd recovered the bundle, which contained a pair of blue work trousers and a plain flannel shirt, with at least one button missing (Gov't. Exh. 16, 17). Shortly thereafter, FBI agents searched along Belvoir Boulevard, and found two stockings, one of which had been knotted, and a pair of black gloves (Tr. 357–358, 364). The getaway car was located in an apartment house parking lot adjoining Cliffview and Belvoir Roads. In it were the empty bank money trays, a money wrapper, coins, and a shirt button (Tr. 292–295). A search of the Oldsmobile uncovered several items of clothing, including a pair of gloves, and four pairs of sunglasses

(Tr. 300–301). Later that day, Delzoppo told an FBI agent that he and Calabrese were driving to a stereo store when stopped, and that all he had thrown out of the window of the car were some tissues (Tr. 304).

At trial, the bank employees who had witnessed the robbery identified the plaid shirt recovered by Officer Lloyd as resembling one worn by one of the robbers. They also made similar identifications of other articles of clothing which had been removed from the defendants after arrest, including their shoes. Petitioner Calabrese fit the physical description of the robber who had vaulted over the teller's counter, and Delzoppo resembled physically the felon who had covered the bank customers (Tr. 50–56, 61–62, 67, 110–118, 155–160, 173–178).

ARGUMENT

1. The court below concluded that the trial judge's participation in the trial, although "regrettable", did not deny petitioners a fair trial (See Pet. App. 27). We submit that the record bears out the conclusion that the actual role undertaken by the judge did not go beyond permissible limits. Some of the court's interruptions reflected a desire to move the trial along and avoid time-consuming questioning of witnesses by either the prosecution or the defense, seeking to stress points already brought out by other testimony (*e.g.*, Tr. 119–121, 261–263). Other comments were within the court's responsibility to rule on evidentiary matters and control the orderly conduct of the trial (*e.g.*, Tr. 64–65, 72–73, 99–100, 136–141, 148, 196–197, 267,

455). The court's own questioning of a few of the witnesses was intended to clarify confusing matters. In one significant instance the examination resulted in an order favorable to the petitioners, that the opinion of an expert was to be disregarded (Tr. 467–484). The court's instructions to the jury during the course of trial dealt largely with the meaning of testimony which had just been elicited. Although such comments might have reduced the strategic value of that testimony, they were not, as petitioners themselves recognize (Pet. 8), erroneous in substance. Nor did they serve any purpose other than to clarify for a jury unschooled in legal procedures or evidentiary rules the legal significance of certain matters, such as testimony given at a previous trial (Tr. 67–69), statements by counsel uncorroborated by testimony of a witness (Tr. 83–84), testimony that defendant resembled the physical description of a robber (Tr. 100), and visual aids to refresh the recollection of a witness (Tr. 145–146).

At no time did the court express an opinion as to the guilt or innocence of petitioners. To the contrary, he admonished the jury that his exchanges with counsel were not to be regarded as favoring either side, and that there were no "hidden meanings in any of the court's language" (Tr. 150, 352).

The record as a whole thus demonstrates that the role performed by the trial judge, while an active one, did not take him beyond the limits of impartiality or serve to deny petitioners effective assistance of coun-

sel or otherwise impair their right to a fair trial. See *United States* v. *Carabbia,* 381 F. 2d 133 (C.A. 6), certiorari denied, 389 U.S. 1007.

2. Shortly after the robbery had been committed, an F.B.I. agent interviewed some of the bank employees, took notes, and thereafter prepared memoranda based upon his notes. Prior to petitioners' first trial, the court ordered the government over its objection to produce these memoranda, which had never been read, acknowledged or signed by the employees. The court felt that the memoranda did not qualify as statements producible under the Jencks Act, 18 U.S.C. 3500, but felt that the defense was entitled to use the statements to assist in preparing for trial.

During the first trial the presiding judge had allowed defense counsel to make full use of these statements in cross-examination. The government made no objection to counsel's reading from the statements in cross-examination. At the second trial the judge initially ruled that counsel could not "cross-examine a witness with that statement as though this was a statement she gave under the Jencks Act" (Tr. 210, Pet. App. 24), because the statements had been prepared by agents from the agents' notes and never seen by the employees. Cf. *Campbell* v. *United States,* 373 U.S. 487. If, however, defense counsel found variances between what the witnesses testified to and what defense counsel found in the statement, the court saw nothing wrong in counsel inquiring as to whether the witnesses had given contrary information to the F.B.I.

(Pet App. 24).[2] Counsel was allowed to proceed in that fashion.

After the testimony of the bank employees had been completed, the court learned that government counsel had no objection to the use of the memoranda as though they were Section 3500 statements, and that counsel was of the opinion that the statements might very well be producible under that statute. The government also agreed to admit the memoranda in evidence as joint exhibits (Tr. 341). The court then reconsidered its ruling on the manner of cross-examination. While it determined that petitioners had suffered no prejudice from the prior restriction on the use of the memoranda in cross-examination, the court nevertheless agreed to allow defense counsel to recall any of the bank employees who had given testimony and conduct further cross-examination. Defense counsel declined the offer, alleging that incurable prejudicial error had been committed (Tr. 333). The court thereafter instructed the jury on this matter, explaining the definition and use of a "Jencks Act" statement, and indicating that its prior ruling limiting the use of certain statements was not intended to show any favoritism (Tr. 343–355).

Even if these documents were properly usable under 18 U.S.C. 3500 to impeach the testimony of the bank tellers, no unreasonable restriction was placed on their

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[2] As the district court stated "[t]here is nothing wrong with that, but I do see something wrong with your holding it up and reading it as though that were her statement * * *" (Pet. App. 24–25).

use by the trial judge, who has considerable discretion to see that cross-examination is conducted in a reasonable manner. See *Palermo* v. *United States*, 360 U.S. 343, 353; *Campbell* v. *United States*, 373 U.S. 487, 493. Moreover, when the court removed all restrictions and accorded defense counsel the opportunity to recall the witnesses, the defense chose to forego that opportunity. As the court of appeals ruled, the totality of these circumstances showed that petitioners suffered no prejudice (Pet. App. 26–27).

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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MARCH 1970.

U.S. GOVERNMENT PRINTING OFFICE 1970